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Innovations in Conflict Management

Research Papers

Research Paper 13

**Promoting Agreement:
The Work of Private Facilitators**

**Paul Teague,
Queen's University Belfast**

**William K. Roche,
University College Dublin**

**Tom Gormley,
University College Dublin**

**Denise Currie,
Queen's University Belfast**

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Introduction

Support for employers and unions engaged in collective bargaining may be provided by private or independent facilitators as well as by state dispute resolution agencies. This paper examines the role of private facilitators in assisting employers and unions to reach agreement, often in the context of significant change and restructuring programmes. Little is known about the *modus operandi* of private facilitators working to assist the parties to collective bargaining, whether in Ireland or internationally. The extent to which private facilitators operate to support collective bargaining, the roles they undertake and any trends in their involvement and activities are subjects about which very little is known. The focus of this paper is on the work of private facilitators in assisting the parties to collective bargaining to reach agreement in circumstances where no current dispute exists and the parties are either seeking to renew existing agreements or to reach new agreements. As private facilitators in Ireland also play a role in facilitating agreement in disputes at the behest of the Labour Court, their work in this area is also examined.

Private Facilitation: International Overview

Internationally the prevalence and nature of private facilitation appears to vary from country to country. The focus here will be on Anglo-American countries that share a tradition of third-party involvement in conflict resolution beyond the ambit of civil courts. In the US and Canada a variety of facilitation roles developed from the 1990s during the vogue in workplace partnership. These involved the provision of support in such areas as quality of work–life initiatives, new forms of work organization, the establishment and facilitation of partnership committees and changes in dispute resolution processes and systems (Chaykowski *et al.* 2001: Ch. 2). Within collective bargaining itself new roles also emerged for third parties – working privately for state dispute resolution agencies – who might now be required to undertake more complex mediation roles that could include addressing deeper underlying issues surrounding the relations between the parties to collective bargaining (Chaykowski *et al.* 2001: Ch. 4). That said, private arbitrators, who have long played a key role in US industrial relations, remain wedded in the main to rights-based adjudicative roles and appear reluctant to adopt more flexible, interest-based roles (Chaykowski *et al.* 2001: 15; Cohen 2010: 14).

In the US education sector, new facilitation and co-facilitation roles (involving pairs of employer and union mandated third parties) also arose in the context of exercises in interest-based bargaining animated by education reforms. Not all approaches to interest-based bargaining however favoured the use of facilitators (Klingel 2003: 33).¹

In Australia, public policy under Liberal/National Party governments from the mid-1990s to 2006 favoured the privatization of conflict resolution by creating financial incentives for engaging private mediators in collective bargaining and by restricting access to the state conflict resolution system. These changes were subsequently reversed by the Rudd/Gillard governments (see Van Gramberg *et al.* 2014). Data collected in a 2013 survey of 230 HR managers in Victoria by researchers at Monash and Swinburne Universities found that private dispute resolution specialists had assisted in resolving collective disputes in 16 per cent of instances – compared to 35 per cent of instances where Fair Work Australia (now the Australian Fair Work Commission) had played a role. Six per cent identified private facilitators as the most effective of the alternative options available for resolving collective disputes, compared to 21 per cent for Fair Work Australia.² It has been observed that private facilitators active in Australia are highly experienced and of high calibre.³ One of the few studies examining the role of private facilitators in interest-based bargaining involves an Australian aluminium manufacturing plant. Macneil & Bray (2013: 719) conclude that the role of the facilitator in interest-based bargaining is a ‘highly sophisticated project’, involving the facilitator working mainly as a ‘process consultant’ but also providing expert information on the processes and techniques used as well as working with the parties involved to diagnose relationship problems. In addition, drawing on Walton & McKersie’s work on integrative bargaining, they suggest that facilitators need to address five objectives to support the bargaining process: building motivation, developing information and an ‘appropriate bargaining language’, improving the knowledge or increasing the skills of the bargaining parties, defining bargaining roles and building trust (Macneil & Bray 2013: 704–6). The picture that again emerges is one in which the facilitator is proactive but non-directive. The process is also seen to involve distinctive principles, phases and problem-solving techniques.

The picture in New Zealand is one in which different modes of facilitation and mediation are nearly monopolized by state dispute resolution agencies. As in Australia public policy and legislative initiatives during the 1990s had called into question the role of public

dispute resolution bodies, especially in the handling of collective conflict (see Rasmussen & Greenwood 2014). In practice private mediation and facilitation have been confined in the main to complex disputes in strategic and rapidly changing sectors. An example is provided by the use of private mediation in a dispute in the Ports of Auckland (see Rasmussen & Greenwood 2014: 464-5).⁴

In the UK, Acas dominates the provision of facilitation and related modes of third-party involvement in collective bargaining (see Saundry & Dix 2014). As in the case of New Zealand, significant exceptions do arise. One example is the role of private facilitation in brokering the three-year agreement, 'Business Transformation and Beyond' negotiated in 2009–2010 between the Royal Mail and the Communication Workers' Union.⁵

Various forms of private facilitation have long been evident in industrial relations in Ireland. In the past however private facilitation appeared to have been very limited in incidence and also *ad hoc* in nature. The numbers of private facilitators providing assisted bargaining and a variety of other services to organizations and their unions have expanded over a decade or more. The field has also become more organized through the creation of specialist consulting firms and divisions in firms offering more general HR consultancy services. A survey conducted towards the end of the Irish boom estimated that about 20 per cent of firms employing 20 or more people and accounting for about 27 per cent of employees had availed of 'external experts to assist in reaching settlement or to prevent deadlock in discussion or negotiation' (Hann *et al.* 2009: Ch. 4). The wording of the survey item means that the estimate could include cases where assisted bargaining services were provided by the LRC.

In summary, private facilitation has played a limited role in conflict resolution in Anglo-American countries. The limited incidence of private facilitation sometimes masks the significance and high profile of the cases in which private facilitators have become involved. It has also been observed that private facilitators could include practitioners of great experience and high professional standing. In the US, private facilitation roles of various kinds developed around the vogue in workplace partnership and related concepts from the 1990s and private facilitators sometimes play pivotal roles in sectors such as education undergoing significant reforms.

The Conduct of Private Facilitation in Ireland

The analysis of the work of private facilitators presented here is based on interviews with six people who have very significant experience in this field. The analysis is supported by the comments and observations of facilitators on their work. Case studies are included to illustrate the activities of private facilitators and to identify the kinds of circumstances in which private facilitation occurs. The following themes focused the conduct of the interviews:

- The circumstances in which organizations and unions seek assistance from private facilitators.
- The processes involved in assisting the parties to collective bargaining.
- The challenges involved in facilitating the parties to reach agreement.
- The objectives of the parties in seeking assistance and the outcomes attained.
- Views on trends in the involvement of private facilitators in assisting the parties to collective bargaining.

Private bargaining facilitators come from a variety of professional backgrounds. They have worked as trade union officials, in employers' associations, as HR managers, in state dispute resolution agencies and not uncommonly in several such capacities over the course of their careers. Many offer a range of services to clients, which include mediation or investigation in disputes involving individual employees and investigation and adjudication in collective disputes. Their professional networks, often extending back to previous industrial relations roles, are important in providing sources of business.

The private facilitators interviewed for this study were chosen to reflect the full spectrum of the professional backgrounds of people active in the area. As will be discussed below, the professional backgrounds of private facilitators influence the ways in which they assist bargainers. Sometimes private facilitators deploy a range of models of facilitation and a wider variety of facilitation methodologies.

Private facilitation may be initiated by employers or by unions but takes place on the joint agreement and invitation of the parties. It is also sometimes initiated or mandated by the Labour Court. Occasionally private facilitation is initiated by IBEC, ICTU and government – working in unison to resolve major disputes. In the experience of those interviewed, a range of circumstances can lead to the involvement of private facilitators

in collective bargaining. Employers may feel that they are operating ‘outside their comfort zone’, especially when dealing with other than traditional bread and butter HR and IR issues like pay claims or redundancies. An important influence has been employers’ attempts to address complex, multi-stranded and often technical problems or change programmes that required, in the words of one facilitator, a ‘lot of teasing out’ of issues. Another remarked that ‘it’s no longer acceptable to launch these programmes [by having] a quick chat with your IBEC person and away we go. That doesn’t work anymore.’ Important in influencing the use of private facilitation in public service organizations have been impending mergers or reorganization or reviews of public services where crises had arisen that had significant HR and industrial relations dimensions. In other instances in both the private and public domains, single issues, such as impending changes to working time, or transfers of undertakings, triggered private facilitation. In some of these circumstances pressure on the parties to find agreement within tight time frames meant that referral to the public dispute resolution agencies was not a viable option. In other circumstances private facilitation was used to ‘forestall threats on the horizon’. Employers have also availed of private facilitation, as have unions engaged in joint working or partnership initiatives. Facilitation was seen by private practitioners to fit well with the ethos underpinning partnership initiatives.

Often the parties engaging private facilitators do not wish to resort to the public dispute resolution agencies. Employers commonly pay for facilitation and so need to have the financial resources to engage a private facilitator. Where private facilitators are engaged, an employer might not have ‘worked out its own agenda’ or the parties might be ‘stuck and there’s a reluctance almost to let a third party make a recommendation on something [with respect to which the parties] really haven’t worked out what they want to do anyway’. There may also be a reluctance to engage in a process that could result in a dispute being adjudicated by a dispute resolution agency through the application of prevailing norms in a sector or at national level.

Some of the varying circumstances in which private facilitators are engaged to assist employers and unions are illustrated in the cases outlined in Box 13.1.

Box 13.1 Private Facilitation in Different Bargaining Conditions

Outsourcing Bin Collection in Dublin City Council

Under the Croke Park Agreement Dublin City Council outsourced its commercial and domestic waste collection service in 2012. Talks between the Council and unions on the redeployment of waste workers focused on terms and conditions of employment. The Labour Court recommended that there should be re-engagement, within a short time frame, around the practical implications of the decision to outsource. A facilitator reported to the Court on matters that had been concluded, including a framework for reassignment, and on the final positions of the Council and unions on other matters. The facilitator reported that progress in resolving a number of issues would require further third-party involvement by the Labour Relations Commission and possibly by the Labour Court. Some people in the frame for reassignment had resorted to a separate binding appeals process in the Council.

Restructuring and Job Losses at Ulster Bank

In 2011 Ulster Bank and the IBOA jointly agreed a mediator to assist in negotiations covering issues ranging from pay, working hours, pensions and contractual issues to pending employment law cases. Proposals were issued in a 'basket of measures' that included pay, an early retirement scheme, voluntary redundancy arrangements and severance terms. The recommendations were described by the mediator as 'representing a most significant step in contributing to the further development of the relationship between the parties. The recommendations were accepted by the employer and in a ballot of IBOA members. The IBOA described the proposals as 'balanced' and as having resulted from 'positive engagement ... involving compromise by both parties'.

In January 2012 Ulster Bank announced a major restructuring programme that contained proposals for up to 950 job losses. Following the failure of direct negotiations with IBOA and SIPTU and IBOA's rejection of the company's severance offer, the mediator was re-engaged to assist the parties reach agreement. A series of recommendations put forward covered early retirement and voluntary severance. An appeals process was outlined and there was provision for the further involvement of the mediator concerning matters of interpretation, but only after manifest attempts by the parties to resolve these directly. The proposals were accepted by the Bank and by the IBOA. The mediator was subsequently involved in clarifying aspects of the proposals.

Productivity Measures and Operating Costs at Boliden Tara Mines

In 2010 Boliden Tara Mines proposed a new set of productivity measures for the remainder of the life-span of mining operations in Europe's largest zinc mine near Navan. The mine employs 700 people. Mining at the site is due to expire in 2018. A two-year agreement, to be subject to renewal at agreed time points, was reached with SIPTU in 2012. The agreement covered ore handling, the use of contractors, pay and the handling of disputes. The agreement also contained proposals for flexible working, the relaxation of demarcation and training. The new disputes procedure included direct local engagement followed by the involvement of an agreed facilitator. The inclusion of provision for a facilitator formalized a practice that had been in use at the mine for a number of years, during which both joint and sole facilitators had assisted the company and unions.

A similar set of proposals to those agreed with SIPTU was presented to the company's craft unions, Unite and TEEU. Following failure to reach agreement, the dispute was referred to the Labour Court. The Court recommended that a facilitator should also be engaged in assisting the parties to the dispute.

The facilitation process ran up against a deterioration in the mine's financial position within the mining group. In November 2012 the company announced that it needed to seek significant cost reductions in its budget for 2013. Reductions were sought in production and payroll costs. Reductions in staffing were to be achieved through early retirements. Doubts emerged about the future of the mine. In accordance with the disputes procedure that had been agreed with SIPTU, the agreed facilitator assisted the parties in local negotiations. When the parties failed to reach agreement, their differences were referred to the LRC for conciliation. Subsequent to conciliation the unresolved dispute was referred to the Labour Court. The employer indicated that there would be a temporary shutdown of operations at the Navan plant in the event of an agreement not being reached on proposed new pay rates. The Court sought an independent financial assessment to inform its investigation, which now involved all unions at the mine.

The Labour Court recommended that an alternative cost-saving agreement proposed by the unions merited consideration and should be subject to joint discussions with assistance from a facilitator. In the event, the parties opted to engage directly with each other without facilitation. Some of the proposals that had been at play when the facilitation process had been suspended the previous year were nonetheless central to talks between the firm and the unions.

The parties reached agreement on a set of cost-reduction proposals that amended the original agreement reached with SIPTU and the company agreed to a significant level of investment in the mine. Agreement was also reached on the establishment of a joint industrial relations forum in which company management and unions would consult on operational issues in the running of the mine.

Staffing Levels at Monaghan General Hospital

Following the completion of a major programme to reconfigure hospital services in the HSE Dublin North East Region in 2009, a dispute arose over staffing levels for non-nursing grades in Monaghan General Hospital. The dispute was not resolved through the local procedure and was referred to conciliation at the LRC and onwards for investigation by the Labour Court. The Court was reluctant to adjudicate on matters that in its opinion were best resolved through direct talks between the parties, and nominated a facilitator to work with the parties to find a solution.

Source: *Industrial Relations News*; HSE records and interviews.

As outlined above, private facilitators are sometimes engaged at the behest of the Labour Court. In such circumstances disputes between parties will have proceeded through conventional disputes procedures and will have been subject to LRC conciliation before private facilitators become involved. The Court will have been reluctant to furnish a recommendation on the grounds that the matters at issue needed further exploration and possibly resolution through direct talks, facilitated by a third party. Not infrequently in instances of private facilitation mandated by the Labour Court, co-facilitation involving a pair of third parties, one with a trade union and the other with an employer background, is the mandated form. In instances where private facilitation is mandated by the Labour Court, the Court will have formed the view that direct local engagement between the parties had been limited – one or both parties having failed seriously to negotiate around the issues in contention. As a result a dispute will have been prematurely progressed

through the stages in a dispute resolution procedure, culminating in a request for investigation by the Labour Court. By mandating private facilitation in these circumstances, the Court in effect is seeking to counter ‘narcotic’ and ‘chilling’ effects whereby an over-reliance on standard dispute resolution procedures by one or more parties had resulted in a failure to narrow down or resolve issues in contention through negotiation. At the same time the Court is reluctant to issue a recommendation on issues that appear to it as better dealt with by the parties involved. Where the Court nominates facilitators, they are mandated where possible to bring about a resolution to the dispute, or to report back on their deliberations and on the views they have formed. These in turn are likely to influence any subsequent recommendation issued by the Court. Assisted bargaining in these circumstances obviously occurs in the shadow of Labour Court adjudication. In instances of post-Labour Court involvement by the LRC, problems arising from recommendations in effect trigger renewed efforts at conciliation. Where the Labour Court itself mandates facilitation, a more general process can ensue which combines facilitation, conciliation and ‘fact finding’ or investigation.

Examples of Labour Court-mandated facilitation are provided by disputes over staffing levels for non-nursing grades at Monaghan General Hospital that arose from earlier LRC facilitation and conciliation initiatives in the HSE Dublin North East health services reconfiguration programme and over the outsourcing of refuse collection in Dublin City Council (Box 13.1) and by a dispute over pay at Liebherr Container Cranes (Box 13.2.)

Box 13.2 Facilitation Mandated by the Labour Court in Liebherr Container Cranes

Liebherr Container Cranes is a German family-owned multinational that has operated in Killarney, Co. Kerry, since 1958. The firm employs 670 people and is the largest manufacturing employer in Kerry. Liebherr is recognized as a good employer but has a recent history of difficult industrial relations. SIPTU represents close on half the workforce and about 60 electricians are represented by the TEEU. Demand for the plant’s product is buoyant and the business is profitable. Liebherr has claimed that the business has been facing increased global competition in a sector where production is mobile in nature.

Liebherr’s unions lodged a claim for a 2.5 per cent pay increase, payable from January 2009, under the national agreement entered into by unions and employers in 2008. The so-called ‘Towards 2016 Transitional Agreement’ was repudiated by the employers’ association, IBEC, which represents Liebherr, when the economic crisis struck in the final quarter of 2008. Liebherr contended that it was not in a position to concede a cost-increasing claim and that such a concession would detrimentally affect employment and the firm’s financial position, and render uncertain the firm’s future viability. The firm offered to pay an increase in three phases, commencing in 2012, with the final phase to be paid in 2014 in return for a number of cost-offsetting and normal ongoing change concessions.

The dispute was referred to conciliation at the LRC and onwards to the Labour Court, which investigated the dispute in May 2012. The Labour Court issued a recommendation which enjoined the parties to engage in meaningful negotiations on matters of concern to the firm and the unions. The Court recommended that these discussions should be facilitated by the LRC and should be completed by the end of July 2012, with any outstanding matters referred back to the Court. The LRC initiative failed to resolve the dispute – the unions insisting that the firm concede the pay rise without conditions.

Subsequent to a further Labour Court hearing in February 2013, the Court nominated two facilitators, one with an employer and the other a union background, to assist the parties in resolving the dispute. Facilitation led to a suspension of unofficial industrial action that had been instituted at the plant and was conducted mainly through separate meetings with the firm and the unions. The facilitators attempted to establish a framework for resolving all the issues in contention. The facilitation process was unable to resolve the dispute. The parties differed over concessions sought by the firm in return for the pay rise claimed by the union and the period over which payment might be made retrospective. The facilitators submitted a report to the Labour Court. In November 2012 a one-day official work stoppage occurred at the plant.

A further Labour Court hearing was conducted in December 2013. The Court formed the view that while the facilitation process was in being there was potential to resolve some of the issues that remained in contention between the parties, while others might require significant changes to conditions of employment. The Labour Court recommended that the firm should pay the 2.5 per cent pay rise with effect from January 2014, retrospective to the May 2012 Court hearing. Payment was to be subject to the parties reaching agreement on areas that remained in contention between them. For the dispute to be resolved, ‘immediate and robust’ engagement between the parties would be required. The Court recommended that the two facilitators who had assisted the parties in 2013 should again play a role in seeking a resolution to the dispute. The Court anticipated that the facilitation process might identify issues that required separate negotiations in a further facilitated process.

The firm accepted the Labour Court recommendation but expressed disappointment with the industrial action and the outcome of the dispute. It announced that it would reconsider aspects of its Irish operations, giving rise to a protest from the union that threats to relocate were not in accordance with good industrial relations practice. The parties disagreed on the significance of some transfer of production from Kerry to other Liebherr plants.

Fears for the plant’s future deepened when, in January 2014, union members rejected the Labour Court recommendation by a wide margin in a ballot. The parties engaged in further local-level discussions and then attended talks at the LRC, chaired by the Director of Conciliation. These led to an agreement brokered *de novo* by the LRC and represented to the parties as definitive of what could be achieved through negotiation. A rejection of the agreement was seen as carrying ‘severe implications’ for the plant. The parties to the dispute accepted the agreement.

Following the original Labour Court hearing in May 2012, the TEEU opted to pursue its claim independently through local talks rather than engage in the facilitation process. Following the resolution of the dispute with SIPTU, the TEEU claim for a pay rise led to an agreement facilitated by the LRC.

Sources: *Industrial Relations News* and various media reports.

These cases also reveal the complex sequence in which LRC conciliation, Labour Court investigation and private facilitation sometimes occur, as well as linkages between these

dispute resolution processes. Some instances were referred to where private facilitation might have been used cosmetically: one of the parties simply seeking to buy time and to show ‘progress’ in their handling of an issue.

An examination of facilitation as practised by private facilitators reveals significant differences of approach or philosophy among facilitators, reflecting their different professional backgrounds and preferences – although all stressed that it was imperative to work flexibly and to adapt approaches both to the circumstances and the wishes of the parties. Some facilitators with a background in organizational psychology and organizational development sought to work, wherever possible, through ‘joint problem-solving’ or ‘group process’ methodologies or even on the basis of a formal interest-based bargaining model. Sometimes people with a background in industrial relations had also been attracted by methodologies, regarding them as one set of tools in the tool-kit of facilitation. Where approaches were adopted, the principles guiding facilitation were derived from templates in the professional literature: ‘[I work] to help them jointly to solve their problems – to construct a solution together.’ ‘[I am] focused very much on the process of helping people talk and engage and argue and debate and gather information.’

More often, facilitators with backgrounds in industrial relations tended to eschew templates or formal models of these kinds. All facilitators deployed a core set of facilitation and conflict resolution skills and competencies. The basic process involved a combination of plenary and separate meetings with the parties, with the greater focus on working through plenary or joint sessions than would be typical of conventional conciliation.

To some extent you have to work separately, but I will always try to maximize the joint and minimize the separate to get to a stage where an outcome is in sight.

Formal and informal engagement – the latter focused mainly around sounding out principals and seeking clarification – were integral to the process. Facilitators typically began their work by agreeing ground rules, clarifying agendas and timescales and outlining the modus they intended to follow in working with the parties. Facilitators commonly drafted documents that charted progress and pointed towards settlement proposals or agreements. Facilitators differed with respect to how directive they were

willing to become to move the process forward. Some described their style as ‘fairly forceful’ or even ‘confrontational’ around matters of detail that separated the parties.

The facilitation process was also understood as typically involving highly intensive engagement. Facilitators spoke of conducting regular half-day sessions, involving one or a couple of meetings each week within a short time-frame.

I’m doing something at the moment and I know that I’m going to be asked to give a couple of weeks to it ... morning, noon and night, and I have to be able to commit to that.

Facilitators differ with respect to the manner in which they seek to frame the issues in contention between the parties. For some, differences and disagreements around specific issues are viewed as symptomatic of deeper underlying dynamics in relationships and cultures and addressing these is seen as integral to facilitation. Thus some facilitators will seek to: ‘broaden the agenda to generate multiple options to solve a problem, or to identify that a problem is bigger than the one issue which has been identified’.

Facilitators will also sometimes be critical of the ‘lack of self-understanding’ of one or other of the parties and of their inability to comprehend the wider culture underlying their dealings. In such circumstances facilitators may see it as an important part of their role to reflect this back to the parties in search of a transformative understanding that might become the prelude to addressing specific and concrete issues: ‘I would be saying straight up ... you need a transformative process, you need to move beyond this.’

Other facilitators stress that they seek, as a matter of principle, to avoid addressing anything other than the problems with which they are presented by the parties, insisting that facilitators are better advised to ‘avoid strategizing the thing’. Their proper role, they contend, using a sporting analogy, is to ‘play what is in front of you’.

I know HR and IR executives who stay awake at night thinking around corners. You deal with what you’ve got. And if [this] leads to another problem, you deal with that problem.

Another area where facilitators differ surrounds whether they are willing, or even sometimes determined, to act as conciliators or adjudicators as part of the facilitative process, either in the event that agreement cannot be reached, or where difficult and

contentious issues hold up the search for agreement. The critical influences here were the professional backgrounds and experience of facilitators and the provenance of facilitation. Some facilitators, particularly those with an organizational development background, are not willing, as a matter of principle, to conciliate or adjudicate. This reflects both their preferred facilitation style or philosophy and their lack of experience of conciliation or adjudication. Some people with a background in conducting group facilitation processes were disinclined to conciliate or adjudicate: 'I wouldn't want to go there because I don't think that's what I have to offer; that's not my skill set.' Others expressed a willingness to act in these capacities if the parties wished them to do so, or if this had been a pre-agreed facet of facilitation: 'you need to be flexible in these roles. The ultimate job is to get the result that's best for everyone.'

People who had experience of having conciliated or mediated in individual or collective disputes expressed a greater readiness to include these processes in their facilitation efforts. This carried the proviso that the parties involved approved of their involvement in these capacities. Where proposals were presented by facilitators, or they engaged in adjudication, the parties involved would have indicated in advance that they were willing to agree to those proposals, or accept the terms of an adjudication decision. Other facilitators actively sought a mandate to conciliate or adjudicate at the outset of the facilitation process. They said that, if it was not formally agreed at the outset that they could conciliate or adjudicate, they routinely sought a mandate for these activities as matters unfolded.

If I get a say in my role, if they agree terms of reference, I have always sought to have an adjudication role at the end. ... If not at the start, I will try to get it in the process. ... It gives me a whole different weight.

The 'weight' that might be gained by facilitators arose from the leverage that facilitation and adjudication could give them when they were in a position to signal to parties that a particular posture would not be likely to hold up under adjudication. They also indicated that the principals on both sides might be able to use such signals to secure agreement within their own constituencies.

They observed that, in conciliation, pressure points or sources of leverage could be found in the prospect that a dispute might lead to a work stoppage or in the spectre of the 'Labour Court hanging around in the background'. In the absence of these pressure

points, some facilitators said that they tried to identify alternatives. Among these were deadlines after which changes would be initiated. Facilitators also sometimes spoke of the weight that could be gained from a professional reputation, or from having been tasked with conducting an independent investigation, or by being part of an ‘expert panel’.

The provenance of facilitation could also shape the role. Facilitators nominated by the Labour Court were commonly mandated to report on proposals for settlement. These were often developed through plenary and side conferences in which the positions of the parties were explored and tested. As such, it becomes clear that facilitation mandated by the Labour Court could involve conciliation, ‘fact finding’ or investigation and what amounted to adjudication – if not by facilitators themselves then by the Court to which they reported back.

Box 13.3 summarizes the main features of private facilitation in assisted bargaining. These sometimes overlap facilitation in assisted bargaining as practised by the LRC. They also reveal some significant points of difference, in particular surrounding the apparent lesser extent to which conciliation skills and postures represented the default skill set underpinning facilitation and also surrounding the more diverse methodologies that private facilitators claim to use.

Box 13.3 Features of Assisted Bargaining with Private Facilitation

- Generally no current dispute exists between the parties involved.
- In some instances facilitation is mandated by the Labour Court as an alternative to issuing a recommendation and as a means of promoting active negotiations between the parties to a dispute – countering ‘narcotic’ and ‘chilling’ effects.
- Generic facilitation and conflict resolution skills are deployed by facilitators to gain agreement on ground rules, shape agendas and promote movement. A combination of plenary or joint and separate meetings is favoured. Facilitators differ with respect to how directive they may be on issues causing deadlock and barriers to progress.
- All facilitators stress the need for flexibility, but some favour, or can offer, joint problem-solving or interest-based bargaining approaches and methodologies.
- Some facilitators refrain from offering to conciliate or adjudicate, or do so only in very isolated circumstances. Others are at ease with these processes, if agreed to by the parties,

and some seek a mandate at the outset or during the process for conciliation and adjudication.

- Deeper engagement possible than with conventional collective bargaining, facilitation or conciliation.
- Facilitation process can encompass conciliation and possibly adjudication/arbitration.

Among the challenges that arise in facilitation, according to private facilitators, was their inability to focus the parties on resolving issues and reaching agreement by highlighting the likely outcomes if disputes issues were referred to the Labour Court. However sometimes, as discussed, the process of reporting back to the Court provided this leverage to Court-mandated facilitators.

Other facilitators pointed to quite different challenges. These included low levels of trust between the parties themselves. Added to this was the challenge of generating trust in the independence of the facilitator, particularly where, as was common, the employer paid for their services. Low levels of trust between the parties or a legacy of mistrust was not seen as insurmountable when this was brought out openly on the table and addressed. For employers and unions to agree to facilitation in the first place, there must have existed some degree of trust, though it was recognized that this might have existed to a greater degree among the principals on both sides than among line managers or shop stewards. Trust in the *bona fides* of the facilitator posed a different challenge. Private facilitators stressed the importance of establishing their neutrality and impartiality and of not being ‘in the pocket’ of either party. This challenge remained where facilitators were engaged because they came from employer or union backgrounds.

Other challenges identified included dealing with personal frictions between or among the parties to facilitation or working with ‘difficult personalities’. Facilitators sought to handle such challenges by allowing for the expression of personal views and by otherwise managing conflict at the table. Weak negotiators that conceded too much to the other side without reciprocation were sometimes a problem, as they would soon lose credibility with their own side. In such circumstances, the facilitator, or even interlocutors on the other side of the table, sometimes worked to shore up the weaker position to avoid the facilitation process collapsing.

Seen as more common were challenges that arose from differences within the sides involved in conciliation. Inter-union and intra-union differences were reported sometimes to complicate or even prevent settlement, especially where dissenting voices on either side stood outside the facilitation process and urged those taking part to persist with a more conventional adversarial posture. In some instances, such as that of Boliden Tara Mines outlined in Box 13.1, separate facilitators worked with bargaining units covering craft and general workers.

Different unions could also adopt contrasting postures towards facilitation. Some major unions were seen to have developed a proactive and strategic appreciation of facilitation, whereas others held a 'different view of the world'. Ideological opposition to facilitation informed by fundamental values could preclude settlements within facilitation, irrespective of the terms on offer. Internal conflicts could also arise between employers, especially in the case of multinational firms, where local subsidiaries might sometimes be unable to win the support of parent companies for settlement terms. Sometimes compounding the inherent difficulty of gaining agreement when complex change programmes were at issue were what one facilitator described as: 'international people, people flying in from abroad that just don't get it as to how we do business here'.

Regarding the objectives of the parties to facilitation and the outcomes of facilitation the predominant view was that employers and unions most commonly entered facilitation to gain a deal or agreement. The most common matters at issue were 'brass tacks', 'the basics: pay, pensions, sick pay'. Other outcomes, such as a deeper understanding of their own positions, or of the other side's difficulties and constraints, or improved relations, were seen as valuable by-products of a process whose objectives and outcomes were mainly pragmatic and concrete. Improved relations and a better awareness of alternatives to adversarial or positional bargaining, or to conventional dispute resolution procedures, were seen as not uncommon outcomes: 'Because they're spending more time with each other ... they're finding out more about there not being hidden agendas.'

Private facilitators presented different views on trends in the use of facilitation. These differences to some degree reflected differences in professional backgrounds and the patterns in the sectors and areas where their work was concentrated. Also in the comments of some, long-term trends in the economy and collective bargaining were most salient. In the case of others, the effects of the business cycle seemed uppermost when

they reflected on trends. So contrasting projections may be as much a reflection of the timescales in respect of which reflections were being offered as of differences in underlying interpretations.

In the view of some private facilitators, the volume of facilitation had grown and was expected to continue growing, either indefinitely or unless economic circumstances changed radically. Growth in the use of facilitation was seen as a reflection of the unprecedented supply of experienced and highly reputable facilitators in the market. For others this growth reflected challenges facing employers and unions, especially around change agendas and particularly in the public service. Others pointed to the new attraction of facilitation for strategically or ideologically well-disposed unions. Even unions that had gained members in the recession were seen to have lost power and to have looked to facilitation as a means of anticipating problems and heading them off in circumstances where change agendas could otherwise be imposed by employers who were now firmly in the 'driving seat'. From this perspective facilitation might be expected to increase in incidence until unions regained power, or pressure from employers eased. The use of private facilitation was sometimes also seen as a reflection of a growing tendency on the part of employers to enlist external expertise to resolve problems within organizations. In the same way that organizations occasionally used solicitors or auditors, they were turning to private facilitators to resolve employment problems within the boundaries of the organization as an alternative to relying on external agencies. Not all of those reflecting on long-term trends thought that facilitation would grow in incidence. Some pointed to declining union density and the shrinking coverage of collective bargaining as developments that would likely depress the use of private facilitation.

Facilitators more focused on the effects of the business cycle, and specifically of the recession, interpreted trends in a different light. For them the recession had significantly depressed the use of facilitation because organizations had less money to spend on the process; bargaining agendas had more commonly revolved around basic 'bread and butter' issues; and employers had become more capable of achieving change without obstruction, more willing to refer disputes to the LRC, or – in the case of the public service – more determined to press matters to compulsory arbitration. In this view the incidence of private facilitation had declined and would continue to be depressed.

Conclusions

Like the facilitators of assisted bargaining in the LRC, private facilitators reverse the long-standing axiom that third parties can best assist in the search for agreement after the parties directly involved became deadlocked and registered a failure to agree. In some instances however the Labour Court appoints private facilitators or co-facilitators to work with parties in dispute to re-activate failed or stalled direct talks and promote agreement. This process of engagement again leads the parties to disputes back towards direct engagement in a manner not envisaged in conventional dispute resolution practice.

Private facilitators handle a range of issues, from complex change and restructuring programmes to changes in conflict management procedures. They also commonly offer clients a range of facilitation methodologies. Some offer joint problem-solving approaches or work on the basis of principles and techniques rooted in interest-based bargaining. Others seem to prefer methods closer to conciliation, although all see a distinction between their work as facilitators and many of the skills and techniques associated with classical conciliation. Private facilitators sometimes engaged in what amounted to informal conciliation conferences, particularly when operating under mandate from the Labour Court. Fact-finding, clarifying the issues at stake between the parties and the merits of their respective positions, also appear to be a common component of facilitation and co-facilitation when mandated by the Labour Court.

Private facilitators differ with respect to whether they are prepared to engage in adjudication. Some facilitators refuse to act in an adjudicative capacity; most however are prepared to do so at the request of the parties; and some seek a mandate to adjudicate as part of the agreed rules guiding the facilitation process.

Complex and blurred relationships are evident between the processes of facilitation, conciliation and adjudication. This complexity extends to the sequences in which these processes may progress, as evidenced by the cases outlined earlier.

The private facilitators interviewed were unanimous that the primary objective of employers and unions in entering facilitation was to reach agreement on concrete issues. Relational outcomes like ongoing improvements in industrial relations were seen as unintended consequences of a process with more immediate objectives.

As in the case of facilitation provided by the LRC, the primary outcome of private facilitation, where successful, involved deeper engagement between employers and unions than occurred under conventional collective bargaining supported by traditional dispute resolution procedures and processes.

As represented by private facilitators, the process of facilitation is versatile in the range of mediation approaches offered by many practitioners, allied to their willingness to occupy multiple mediation roles that can include facilitation, conciliation and even adjudication.

Private facilitation was triggered by a series of influences. Complex change and restructuring programmes were commonly identified as important influences. Most private facilitators expected the incidence of private facilitation to grow over the medium to long term. While there may have been a cyclically induced dip in the incidence of assisted bargaining, in the opinion of most, longer-run changes in business conditions, in the practice of management, in the postures of major unions and in the availability of skilled facilitators were set to increase the prevalence of assisted bargaining.

It is possible to identify about 20 high-profile private facilitators who regularly – if not continuously – engage in facilitation. Beyond this core group of highly reputable and experienced facilitators, many others claim either expertise or experience in various modes of workplace dispute resolution. The view of most private facilitators – a view shared by some colleagues working in state dispute resolution agencies – was that private facilitation was set to grow in Ireland.

How can the emergence of a critical mass of private facilitators be explained? Certainly the growth of private facilitation cannot be attributed to any adverse perceptions of the effectiveness of the LRC as the State's main dispute resolution agency. The LRC continues to enjoy high standing among employers and unions and indeed among private facilitators themselves. Like state dispute resolution agencies in other countries, the LRC's services remain free at the point of use, and public policy has never sought to incentivize resort to private facilitation or conciliation.

A key distinctive driver of the development of private facilitation in the Irish case might be the institutional framework for conflict resolution in Ireland as this has developed over a period of more than two decades. The role assigned to the LRC in national and sectoral

agreements may well have acted as a significant catalyst for employers and unions to experiment with private modes of facilitation. Under the regime of social partnership that existed for more than 20 years up to 2009, the LRC was the designated agency for resolving disputes on matters covered by national agreements and in discharging that role acted as a gatekeeper to investigation by the Labour Court. This may well have fostered the perception on the part of some employers and unions that the activity of the LRC had inevitably become constrained by the terms of national agreements and that conciliation was a conveyor belt to the Labour Court, where adjudication would certainly take account of the terms of prevailing national agreements.

Such a perception might have been strengthened as a consequence of the role of the Labour Court in ‘policing’ national agreements which were extended through the emergence of what amounted to binding determination or mandatory arbitration by the Labour Court during the second half of the social partnership era.

There were many references in interviews with private facilitators, as indeed also in interviews with LRC officers, that one of the key reasons why parties sought ‘extra-procedural’ facilitation was their reluctance to set in motion the procedural steps involving conciliation by the LRC and investigation by the Labour Court. With the collapse of social partnership in 2009 and the advent of the Croke Park/Haddington Road agreements in the public service, the LRC continued in broad terms to play a similar role to that played under the social partnership agreements. The Labour Court continued to arbitrate on disputes under Croke Park/Haddington Road. In the private sector, the LRC and Labour Court have continued to be the designated pivotal agencies for dispute resolution under the ‘protocol’ agreed between IBEC and the Irish Congress of Trade Unions following the collapse of social partnership. So in part the private facilitation sector in Ireland may have grown as an unintended consequence of the designated role of the LRC and Labour Court in national agreements and in successor public and private sector agreements.

Another institutional influence on the incidence and prominence of private facilitation in Ireland has been the practice of the Labour Court to appoint facilitators or co-facilitators in some disputes where the Court is reluctant to adjudicate and forms the view that matters in contention are best addressed in facilitated direct talks between the parties involved. While this process only impacts on a small number of disputes, operates under

the shadow of adjudication and lacks the flexibility that arises where there is voluntary joint resort to facilitation, it has contributed to institutionalizing private facilitation within the Irish dispute resolution system. The predominant practice of the Court however is to refer disputes to the LRC for further deliberation. More generally, the recent vogue in the use of ADR to resolve disputes in such areas as commercial and family affairs has added further to the impetus that led to the growth of the private facilitation sector – even though public policy and legal reforms in employment dispute resolution have been more tentative in deference to the pivotal roles in these fields of the LRC and the Labour Court.

Another influence on private facilitation is the supply of experienced and highly reputable practitioners available to provide this service. As the demand for private facilitation has grown, the supply of private facilitators has also grown in response and the market for private facilitation has become more organized. Both general HR consultancies and specialist conflict resolution firms have begun to market their services actively to prospective clients. In turn, the salience of private facilitation has increased and more people have become aware of the potential to pursue careers in this field. This in turn has fed the growth of professional training programmes and of professional mediation bodies.

These various influences, interacting in a self-reinforcing spiral, have contributed to the growth and institutionalization of private facilitation in a manner that has not been planned or designed by any of the parties to the dispute resolution process.

Notes

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